GER-MAL SDN BHD

v.

ZULKIFLI HASSAN & ANOR

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL ACTION NO: 22-14-1996]
31 JANUARY 2001

CIVIL PROCEDURE: *Absence of plaintiff and his counsel - Reasons given - Whether acceptable*

CIVIL PROCEDURE: *Action - Dismissal of action - Options available to plaintiff - Whether to file a setting aside order or to file an appeal against order - Rules of the High Court 1980*

Pursuant to an administration exercise, this case was transferred to the learned judge's court fixed for mention on 31 January 2001 requiring the presence of the plaintiff's counsel. Neither the plaintiff nor the plaintiff's counsel were present, but instead one Encik Azahir presented himself who was supposedly willing to mention on behalf of the defendants, and at the same time undertook to mention on behalf of the plaintiff's solicitor.

On the same day, *ie* 31 January 2001, the plaintiff's counsel had faxed to the court the message **"received 31 Jan 2001, Mahkamah Tinggi Malaya, Kota Bharu"**. Among the reasons supplied in it pertaining to the plaintiff counsel's absence were; i) the counsel personally handling the matter had resigned; ii) the substitute counsel was tied down with civil action 5-5-2003 at the Sessions Court, Kuala Lumpur and; iii) the defendant's counsel had agreed to mention on behalf of the plaintiff.

Held:

[1] After due deliberation, the learned judge struck out the case from the court's list without going through the merits of the case by the following reasons; i) the plaintiff had been informed to be present but had not done so. Furthermore, the plaintiff's counsel had been absent on several previous dates from attending court; ii) the reasons given by the plaintiff's counsel were unacceptable, as reiterated in many circulars; iii) the fact that the defendant was willing to mention the matter on behalf of the plaintiff did not attract the sympathy of the court, as the learned judge was unable to locate in the file any documentation confirming that En. Azahir of T/n Azahir Surainie & Azizan Ariff had been appointed to represent the

defendants. Even if the defendant's papers were in order, the reasons supplied were still unacceptable; iv) by sending the fax at the eleventh hour, and eventually not being present, the plaintiff was certainly being presumptuous of being successful in the application or was cavalier of its outcome; and v) in the interests of justice and convenience of the court, the case ought to be struck out.

[2] Based on the Rules of the High Court 1980 and subject to the facts available, the plaintiff is not empowered to file a setting aside application against the learned judge's order above. In such a circumstance, unless the plaintiff could prove that the learned judge's order had not been regularly obtained, thus enabling the plaintiff to have the order set aside *ex debito justitiae*, and within the perimeters of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd.*, the only recourse left was to file an appeal, and of which the plaintiff had done so.

[Case struck out.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors [1990] 2 CLJ 961 ***(refd)***

Chung Sow Mun v. TRR Kurup [1989] 3 MLJ cix ***(refd)***

Gan Kim Kiat Bros Realty Sdn Bhd v. Leang Ah Kan [1983] 1 MLJ 351 ***(refd)***

Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana [1982] 1 MLJ 77 ***(refd)***

Koperasi Serbaguna Cuepecs Tanggungan Bhd v. City Investments Sdn Bhd [1983] 2 MLJ 33 ***(refd)***

Merlimau Pegoh Limited v. Collector of Land Revenue Jasin [1969] 248 ***(refd)***

Patani Metal Sdn Bhd v. Lt Cdr (B) G Thygarajah [2001] 5 MLJ 241 ***(refd)***

PP v. Ng Goh Weng [1979] 1 MLJ 127 ***(refd)***

Schafer v. Blyth [1920] 3 KB 141 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(foll)***

Vint v. Hudspith [1885] 29 Ch D 322 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 5, O. 3 r. 5, O. 35 rr. 1, 2, O. 42 r. 13, O. 56

Other source(s) referred to:

Chief Justice Circular KHN No 47 of 2000

The Supreme Court Practice, 1997, p 616

The White Book, 1997, p 617

For the plaintiff - M/s Teh & Assocs

For the defendant - M/s Azahir Surainie & Azizan Ariff

Reported by Raja Vishnu Sivarajah

JUDGMENT

Suriyadi Halim Omar J:

Pursuant to an administrative exercise, this case was transferred to my court, with it fixed for mention before me on 31 January 2001. On that date one Encik Azahir was present, supposedly on behalf of the defendants, and at the same time undertook to mention on behalf of the plaintiff's solicitor. Regretfully for the plaintiff, I still struck out the case despite the defendants' counsel's undertaking and remarks. To appreciate why I struck out this case, a cursory perusal of the chronology of events becomes highly necessary.

Sometime on 21 April 1996 the writ of summons was filed. The affidavit of service affirming the service by post to both the defendants on 27 September 1996 was filed. On 4 November 1996 the certificate of non-appearance was filed. *Vide* a letter dated 2 February 1998 a show cause letter for want of prosecution was posted to the plaintiff. The reply was that as they had obtained a judgment in default order (JID) on 30 May 1998 their presence in court thus was excused. Subsequently an application was filed by the defendants to have that JID set aside, to permit them to file their defence and to stay the execution of the JID pending the outcome of the setting aside application. Affidavit and counter affidavits ensued from both sides. Finally on 11 September 2000 the court pronounced that the JID was indeed defective, and accordingly ordered the defendants to file their defences within fourteen days. At this stage the abovementioned Azahir was present and had mentioned the matter for the plaintiff. The defendants subsequently filed their defences. To cut the matter short, the court *vide* a letter dated 23 January 2001 had informed the plaintiff's counsel that the case had been transferred to my court, and his presence was required on the fateful day of 31 January 2001. As said above, as neither the plaintiff nor his counsel were present, and in spite of Encik Azahir's willingness to mention on behalf of the plaintiff's counsel, I still struck out the case.

It transpired that on the very day of 31 January 2001, the plaintiff's counsel had faxed a message to my Senior Assistant Registrar. On that document were imprinted the words "received 31 January 2001, Mahkamah Tinggi Malaya, Kota Bharu". I did not scribble anything on it, to indicate whether I had consented or otherwise, to the contents of the fax. How could I have that opportunity when that was the very day of the mention date? I thus knew of that fax in the open court. Amongst the reasons supplied, for not being present were:

1. the counsel personally handling the matter had resigned;

2. the substitute counsel was tied down with civil action 5-5-2003 at the Sessions court, Kuala Lumpur; and

3. the defendant's counsel had agreed to mention on behalf of the plaintiff.

As regards whether I ought to grant an adjournment, I took into account the following matters:

1. The importance of the proceedings and their likely adverse consequences to the party seeking the adjournment.

2. The risk of the party being prejudiced in the conduct of the proceedings if the application were refused.

3. The risk of prejudice or other disadvantage to the party if the adjournment were granted.

4. The convenience of the court.

5. The interest of justice generally in the efficient dispatch of court business.

6. The disability of not delaying future litigants by adjourning early and thus leaving the court empty.

7. The extent to which the party applying for the adjournment had been responsible for creating the difficulty which had led to the application (*The White Book* 1997 p. 617).

After due consideration I struck out the case, without going through the merits of the case as:

1. the plaintiff had been informed to be present but had not done so;

2. the reasons were unacceptable, as reiterated in many circulars e.g. *Chief Justice Circular KHN No. 47 of 2000*;

3. the fact that the defendant was willing to mention the matter on behalf of the plaintiff did not attract the sympathy of the court, as I was unable to locate in the file any documentation confirming that En. Azahir of T/n. Azahir Surainie & Azizan Ariff had been appointed to represent the defendants. In other words I found no "memorandum perlantikan peguamcara" filed by them. Even if the defendant's papers were in order the reasons supplied were still unacceptable;

4. by sending the fax at the eleventh hour, and eventually not being present, the plaintiff was certainly being presumptuous of being successful in the application/or was cavalier of its outcome; and

5. in the interest of justice, and convenience of the court, the case ought to be struck out.

Needless to say, this was not the first time that the plaintiff's counsel was averse to coming to court. The latter was not present in court on 30 May 1998, 11 September 2000 and also 31 January 2001. The fact that a fax message was received on the very day of the mention date speaks volume of the plaintiff counsel's attitude and respect towards the court. Having considered the grounds supplied, as well as the circumstances surrounding the matter, I saw no reason to adjourn it (*Go Pak Hoong Tractor And Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77).

No doubt, as the plaintiff had appealed against my decision, my bounden duty was merely to prepare the grounds and no more. Once I had supplied the above five main reasons my responsibility ended. Be that as it may, what disturbed me and hence the continuance of this ground of judgment was the fact that instead of attempting to reinstate the matter, the plaintiff had filed this appeal, a course of action that went against the general trend. On that premise some comments are required. At the outset, I must state that when striking out this case without considering its merits, I had merely struck out the case from the court's list of cases based on the above five reasons.

I need to add that even though the terminology of "mention" has no place in the Rules of the High Court 1980, courts have generally adverted to its usage not infrequently, due to its acceptability by the legal fraternity and the judicial system. In general, that word has been accepted to cover a date supplied by the court, specifically fixed to resolve certain questions, but certainly does not include a hearing date. To be more specific, a court may fix a mention date purposefully to obtain some feed back from the parties due to some reason or other, or for some other administrative reasons. In contradistinction, if a hearing date were supplied, it is universally accepted that on such a date a trial is anticipated (*PP v. Ng Goh Weng* [1979] 1 MLJ 127; *Chung Sow Mun v. TRR Kurup* [1989] 3 MLJ cix). At that trial date there will be a final determination of the case, whereupon judgment may be given (*Merlimau Pegoh Limited v. Collector of Land Revenue Jasin* [1969] 248; *Koperasi Serbaguna Cuepecs Tanggungan Bhd v. City Investments Sdn Bhd* [1983] 2 MLJ 33).

Based on the above facts, I could not invoke either the statutory powers as provided for under O. 35 rr. 1 and 2 of the Rules of the High Court 1980. Order 35 r. 1 of the Rules of the High Court 1980, certainly was out as this provision envisaged a scenario where both parties, namely the plaintiff and the defendant were absent (*Gan Kim Kiat Bros Realty Sdn Bhd v. Leang Ah Kan* [1983] 1 MLJ 351, *The Supreme Court Practice* 1997 p. 616). In the current case even though the plaintiff was not present, but the defendant was,

I concluded that the specific provision of O. 35 r. 2 was similarly irrelevant. The final point that was too obvious was that 31 January 2001 was fixed for case management purposes (mention), and never for trial. Had the facts been different and I had alluded to those provisions, indisputably I could have set aside my striking out order, and on such terms as I thought just (O. 42 r. 13). No inhibitive provisions or bar existed that could prevent me from restoring the matter, colloquially referred to as "reinstatement" (*Schafer v. Blyth* [1920] 3 KB 141; *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1990] 2 CLJ 961; *Patani Metal Sdn Bhd v. Lt Cdr (B) G Thygarajah* [2001] 5 MLJ 241; *Vint v. Hudspith* [1885] 29 Ch D 322).

Had the plaintiff been out of time, he could easily have surmounted the problem by applying for an extension of time (O. 3 r. 5; *Schafer v. Blyth (supra)*). As my order was pronounced on 31 January 2001 with the notice of appeal being filed on 21 February 2001, the plaintiff would never have been out of time, had it wanted to undertake a setting aside action. I had to assume that the course of action of the plaintiff here, to act as it did i.e. by filing this appeal must have been deliberate. This was accentuated by the fact that it never was without the advice of Teh & Associates, Advocates & Solicitors. Have perused the facts and law, I came to the conclusion that the action of the plaintiff was absolutely in order. I now give my reasons.

Order 42 r. 13 of the Rules of the High Court reads:

> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

Highly relevant pointers that I could make out of this provision are that:

1. as this sub-rule speaks of "Rules" then its applicability is not confined to matters in O. 42 (as opposed to the clarification in O. 1 r. 5). That being so, this general provision will be applicable to orders or judgments obtained pursuant to provisions outside the scope of O. 42, irrespective whether from a trial or not;

2. this sub-rule will apply where provisions exist for the setting aside or varying of any order. If there are no provisions, the applicant thus must resort to other methods e.g. by filing an appeal pursuant to O. 56;

3. there must be an application. Even though no criteria or clarification is made as to who may apply, the intended applicant must be confined to certain permissible persons;

4. the application must be served on the party who has obtained that order or judgment; and

5. it must be served within thirty days after the applicant has received that order or judgment.

Having scrutinised the Rules of the High Court, and subject to the facts available before me, I regretfully failed to identify any provision that empowered the plaintiff to file a setting aside application. In such a circumstance, unless the plaintiff could prove that my order had not been obtained regularly, thus entitling the plaintiff to have the order set aside *ex debito justitiae*, and within the perimeters of *Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, the only recourse left was to file an appeal, and of which it had done so.

To return to the main issue, in the circumstances of the case based on the five main reasons supplied above, I had no hesitation in striking out the case from the court's list.